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HAROLD B. WILLEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 186

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GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

*versus*

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

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## BRIEF FOR RESPONDENT.

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IN THE

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GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

*versus*

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

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*On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.*

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## BRIEF FOR RESPONDENT.

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### OPINIONS BELOW.

The opinions of the Jefferson Circuit Court, Chancery Branch, are unreported. The memorandum opin-

ion of April 23, 1953, appears in the Record on pages 34-5. The opinion of April 22, 1953, appears in the Record at pages 22-33. The opinion of the Court of Appeals of Kentucky, as originally handed down, is reported in 258 S. W. 2d 903. The opinion as modified on rehearing is reported in 264 S. W. 2d 250. For the convenience of this Court, we have printed these opinions in Appendix in a consolidated form, in order to show the modifications made to the first opinion by the second.

## STATUTES INVOLVED.

In addition to the sections of the Interstate Commerce Act (Motor Carrier Act) cited by petitioners, respondent cites Sections 9, 22 and 204(1) thereof, 49 USC, Sections 9, 22 and 304(1); respondent also cites Section 4(a) and (i) of the Norris LaGuardia Act, 29 USC 104(a), and Kentucky Revised Statutes Section 281.990.

## STATEMENT OF THE CASE.

Respondent, The American Tobacco Company, Inc., owns and operates a factory in Louisville, Kentucky, where it manufactures cigarettes. A wholly-owned subsidiary of respondent, American Suppliers, Inc., occupies space at the center of respondent's Louisville property. American Suppliers is engaged in the business of purchasing, curing and processing leaf tobacco.

Petitioners, General Drivers, Warehousemen and Helpers Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., are the certified collective bargaining agent for certain employees of American Suppliers. They are also the collective bargaining agent for the employees of practically all of the common carriers by motor vehicle in the Louisville area.

A strike of American Suppliers' employees, accompanied by picketing of the Respondent's factory, began on March 30, 1953. Respondent had approximately 1,500 employees at this plant, of whom a substantial majority were Union members. Nearly all of Respondent's employees continued at their work notwithstanding the necessity of crossing a picket line. However, members of Local 89 very shortly began to apply every type of pressure at their command in an effort to shut down Respondent's operation, including mass picketing, violence, threats, damage to property, blocking access to the plant, and refusal to permit common carriers to transport Respondent's shipments.

**The Case Presented to the Kentucky Courts.**

On April 4, 1953, Respondent sought an injunction against petitioners in the Jefferson Circuit Court, Chancery Division, because of petitioners' acts of violence and also because petitioners were picketing Respondent's entire block. Respondent alleged that it had no connection with the labor dispute between American Suppliers and petitioners and that the picketing should be restricted to such entrances to the property as the employees of American Suppliers habitually used. Respondent also sought relief from the interference with shipments to and from its plant which was being caused by members of petitioners who were employees of common carriers.

The petition filed by Respondent, on April 4, 1953, sets forth in numbered paragraphs fifteen classes of illegal acts committed by Local 89 and its members, of which the refusal to transport shipments was No. 13 (4-6).* Relief from all these unlawful activities was prayed, the relief as to interference with transportation being only one of five specific prayers (7, 8). None of these activities were described in the petition as an unfair labor practice. They were all alleged to be "in violation of the public policy and the law of the State of Kentucky" (4). The trial court held that they were a wrong against Respondent and "a violation of Kentucky law in a field not covered exclusively

*Numbers in parentheses without a prefix refer to pages of the record. Numbers prefixed with "P. Br." refer to pages of the brief of petitioners. Numbers prefixed with "NLRB" refer to pages of the brief for the National Labor Relations Board as *amicus curiae*.

by the Federal Act" (26). The Court of Appeals, noting that "this disobedience is not complained of as an unfair labor practice, but as a violation of the common law, the statutory law and the Constitution of Kentucky" (102), affirmed.

**The Relief Granted by the Trial Court.**

On April 6, 1953, the court granted a restraining order which forbade causing or threatening injury to persons or property of the employees of Respondent, or to its own property, and from using abusive, vile, profane or threatening language to Respondent's employees or others seeking to enter or leave its premises. Prevention of the illegal acts so forbidden was vital to Respondent's continuing operations. The scope of relief from such acts was continued in slightly narrowed form by the permanent injunction. Petitioners took no appeal from these portions of the permanent injunction and they are not before this Court. However, in view of the questions as to the original jurisdiction of the Kentucky court, it is material that these illegal acts, as to which the state court unquestionably had jurisdiction, and from which the Union took no appeal, were an integral and vital part of the case presented to the Kentucky court. The order requiring members of Local 89 to continue to transport Respondent's shipments was only a portion of the relief which it prayed and was granted. In addition to enjoining members of petitioners who were employees of common carriers from discriminating against Respondent by

their refusal to pick up and deliver Respondent's shipments, the court also enjoined picketing at the main entrance to Respondent's premises on one side of the block, but allowed picketing on the other three sides at entrances which the employees of American Suppliers normally used (36).

The court held a hearing eight days after its restraining order, and after taking proof granted a permanent injunction. The court found (22-31) that Respondent and American Suppliers were so closely related both geographically and as to ownership that they should be considered as one. It thereupon rescinded its ban against the picketing of Respondent's main entrance and allowed pickets on all four sides of the block. The next day the court also held (34) that the permanent injunction should also restrain any unlawful discrimination by members of petitioners who were employees of common carriers against Respondent.

No appeal was taken by petitioners from the portions of the permanent injunction relating to illegal acts other than the truck drivers' refusal to serve Respondent, and no other issues are before this Court.

### The Factual Issues.

The assumption in the brief of the National Labor Relations Board as *amicus curiae* that the Union directed its drivers not to serve Respondent is contrary to the evidence. The officers of Local 89 testified positively that they had instructed the members to perform

their duties, and the great weight of the evidence was to the effect that the refusal of each truck driver was a result of his individual decision (19, 60, 61, 62-63, 65, 67, 68). While the Trial Court, in passing upon the refusal of the drivers of one carrier found as to one agent that he, "indirectly encouraged or induced the refusal" (33), it absolved Local 89 and its other officers from doing so (40).*

The record also shows that what refusals there were to enter upon Respondent's premises did not take place when there was any picket line at Respondent's main entrance (52, 67, 60), but while the preliminary restraining order was in force and kept pickets from Respondent's main entrance. This entrance was the one which common carriers normally used in picking up and delivering Respondent's shipments.

When the employees of the carriers, who were also members of Local 89, refused to handle Respondent's goods, the carriers repeatedly demanded of their employees that they handle the goods (12, 32, 38, 42-5, 51, 56-7, 64-8), and their managers assisted Respondent with evidence (37, 42).

There was no showing that the carriers' drivers would encounter any physical danger in crossing a picket line set up by members of their own union.

Petitioners did not argue that the refusal of the employees of the common carriers to serve Respondent

*A number of contempt rules were subsequently issued in connection with similar refusals, and in no case was Local 89 or any of its officers held to have violated the injunction. The record for the Court of Appeals was made up before the Trial Court's action on these rules, so the record here does not reflect it.

was reasonable or excusable or not discriminatory; instead they argued that the Kentucky courts had neither jurisdiction nor power to interfere with the refusal, because of the provisions of the Labor Management Relations Act and the contract between the carriers and their employees.

**The Decision of the Kentucky Court of Appeals.**

Petitioners appealed to the Court of Appeals of Kentucky from the injunction, and Respondent cross-appealed the holding that it and American Suppliers were to be treated as one. The Court of Appeals affirmed the judgment on both appeals. Petitioners moved for a rehearing. While their original ground of appeal had been that the Labor Management Relations Act had deprived the Kentucky courts of jurisdiction to pass upon the refusal of the employees of the common carriers to cross a picket line, their petition for rehearing argued for the first time that the Interstate Commerce Commission had jurisdiction to determine the case.

The Court of Appeals denied a rehearing on February 2, 1954.

Petitioners' Statement of the Case (P. Br. 12) quotes portions of one paragraph from the Court's Opinion relating to refusals to handle Respondent's shipments, but Respondent believes that the entire paragraph shows more clearly the rationale of the decision. It appears at page 102 of the Record, and the portions italicized were omitted by petitioners:

"The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10* v. *Graham,* 344 U. S. 811, *and the cases cited therein.* It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper."*

This Court granted certiorari on October 14, 1954. 348 U. S. 813.

## SUMMARY OF ARGUMENT.

The courts below enjoined the refusals of employees of certain common carriers to handle respondent's shipments. These refusals have been referred to as refusals to cross picket lines but an examination of the record in the case reveals that the drivers' refusals to serve that appear therein did not occur when there was any picket line at respondent's entrance, and no question is presented as to the obligation of any persons other than carriers' employees to cross picket lines. These refusals constituted illegal discrimination under the law governing common carriers as it is generally understood throughout the United States.

The Labor Management Relations Act does not deprive the courts of Kentucky of jurisdiction to enjoin these refusals. Jurisdiction over these refusals is not in the National Labor Relations Board. The proviso to Section 8(b) of the Labor Management Relations Act prevents these refusals from being regarded as unfair labor practices under the earlier provisions of Section 8(b). Section 8(b) is also limited to acts done by "a labor organization or its agents," and the refusals here were shown to be spontaneous, and contrary to instructions of the union (19, 60, 62). The National Labor Relations Board thus has no jurisdiction over them on this ground, nor do the federal courts, since Section 10 of the Labor Management Relations Act authorizes the National Labor Relations Board to seek injunctive relief only where unfair practices under Section 8 have occurred. At the same

time, the proviso to Section 8(b) does not supersede state law governing common carriers; the proviso to Section 8(b) is concerned only with the power of the National Labor Relations Board.

The refusals were not protected under Section 7 of the Labor Management Relations Act. A practice not unlawful under Section 8(b) is not necessarily entitled to protection under Section 7, and certainly not when it is otherwise unlawful. The refusals were not protected by the employees' right to strike under Section 13, since they continued on their jobs and served other shippers, disobeying their employers only when respondent's goods were to be carried. A partial strike is not a protected activity; furthermore the injunction below expressly preserved the employees' right to strike or to leave their employment.

The refusals, being neither protected by the Labor Management Relations Act nor subject to any remedy given by the Act, were in the field which is left open to state regulation. The Kentucky courts properly exercised their power to prevent irreparable injury by enjoining this form of discrimination against respondent, while at the time time respecting the rights of the drivers to strike or to leave their jobs. Inasmuch as the discrimination against respondent was illegal, the injunction below was properly extended to prohibit inducement to commit acts of discrimination.

The provision in the contract between the common carriers and their employees allowing the employees to refuse to cross picket lines is ineffective against the law of Kentucky. Private individuals may not by

contract impair a state's enforcement of its law and public policy. Neither is this provision protected by Section 7 or the proviso to Section 8(b) of the Labor Management Relations Act, in so far as it purports to excuse the employees of common carriers from performing their duties.

The question of the jurisdiction of the Interstate Commerce Commission was not timely presented in the courts below. It first appeared in the petition for rehearing before the Court of Appeals of Kentucky. It was not decided on the merits, since Kentucky law does not require the Court of Appeals to pass upon a question not raised in the trial court. The Court of Appeals did not discuss the question in denying the petition for rehearing. The certificates of a justice of the Court of Appeals, appearing in the record before this Court, are insufficient to raise the federal question.

If, however, the question of the jurisdiction of the Interstate Commerce Commission is properly before the court, it has no substantive merit. There was no necessity for primary resort to the Interstate Commerce Commission against the discrimination which the Kentucky courts enjoined. The special competence in transportation matters which the Interstate Commerce Commission possesses was not necessary to decide the question of discrimination, since only a question of law was presented—the illegality of the refusal to serve respondent—and this question is properly cognizable in the courts.

Furthermore, the Interstate Commerce Commission has jurisdiction, in a situation like that before the

court, only over common carriers and not over their employees. It could not grant relief to respondent against discrimination practiced by members of petitioners who are employees of common carriers.

Respondent, which was suffering injury for which neither the federal courts nor the National Labor Relations Board nor the Interstate Commerce Commission could grant relief, properly sought and obtained relief in the courts of Kentucky.

# ARGUMENT.

## POINT I.

### The Refusal by Employees of a Common Carrier to Pick Up and Deliver Shipments Is Not a Right Protected by the Labor Management Relations Act, and the National Labor Relations Board Does Not Have Jurisdiction Over It.

#### A. THE SCOPE OF THE INJUNCTION BELOW.

The portion of the permanent injunction which petitioners attack before this Court is brief, and analysis shows that the trial judge carefully chose its wording to make sure that it did not impair any federally-protected rights of the affected employees or infringe upon the jurisdiction of the National Labor Relations Board or the Interstate Commerce Commission.

It enjoins the Union, its members, and their confederates and associates:

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers" (36-7).

The primary act enjoined is the refusal of the carriers' employees to perform their legal duties, and the petitioners' argument is principally addressed to this portion of the injunction rather than to the secondary portion which forbids "inducing, encouraging, coercing * * *" the refusal. Since the court may properly enjoin accomplishment by indirection if it may enjoin the direct act, the exact terms and limitations of the primary portion of the injunction become the controlling issue in this case. As to this, it will be noted that it does not apply to carriers, nor to the union as an entity, nor to the striking employees of respondent's subsidiary, but only to a limited portion of petitioners' members who are employees of common and contract carriers. Thus it applies only to those who are subject to Kentucky Revised Statutes, Section 281.685*; the employees of non-carriers are not affected. It therefore renders inapplicable such cases as *Bus Employees* v. *Winconsin Board,* 340 U. S. 383 (1951); *Globe Wireless, Ltd.,* 88 N. L. R. B. 1262 (1950), enforced, 193 F. 2d 748 (9th Cir., 1951); and *Hazen & Jaeger Funeral Home,* 95 N. L. R. B. 1034 (1951), enforced, 203 F. 2d 807 (9th Cir., 1953), which petitioners cite, since in all those cases there was an interference with the right of those engaged in a labor dispute with their employers to strike or picket.

The provision of the injunction applies to the employees of carriers only "while remaining an employee," so it does not impair their right to leave their employment.

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*P Br. 102.

It applies to those employees only "so long as property is being handled, transported and delivered by or to other customers," so it does not impair their right to strike. Again the cases mentioned above which petitioners cite are inapplicable, since they all interfered with the right to strike.

It only forbids those employees to refuse to handle goods "in accordance with their legal and contract obligations" and then only when the result is to cause the carriers "unreasonably to discriminate," *i. e.*, to violate the Constitution and statutes and common law of Kentucky. Ky. Rev. Stat., § 281.685.

It applies only to "property shipped by or to plaintiff" (Respondent). Respondent's subsidiary, American Suppliers, closed down its Louisville plants completely during the strike against it. No shipments to or from those plants, and no picket line other than that around respondent's premises, were ever in question.

The provision of the injunction does not apply to picketing or affect the right to picket. Picketing was expressly permitted by another paragraph of the injunction (36).

In short, the provision does not require any member of petitioners to perform service without his consent. He is free to strike or leave his employment at any time. But if he chooses to work for a carrier, he is obligated to obey the law governing carriers so long as he does so.

The court did not, as petitioners suggest, take "the view that a sympathy strike by employees of common or contract carriers was permissible" (P. Br. 23),

thereby inviting a violation of Section 8(b)(4)(A) of the Labor Management Relations Act. The Court of Appeals merely recognized that any individual driver who did not want to cross the picket line had a right to quit or strike, as did the Wisconsin Employment Relations Board in its order which this Court upheld in *Int'l Union, U. A. W. A.* v. *Wis. Employment Relations Board,* 336 U. S. 245, 250 (1949).

**B. THE REFUSAL OF THE CARRIERS' EMPLOYEES TO SERVE RESPONDENT WAS A CLEAR VIOLATION OF THE LAW OF CARRIERS.**

Petitioners and the National Labor Relations Board consistently refer to the law requiring common carriers and their employees to serve all shippers without unreasonable discrimination as "Kentucky" law. This is accurate as far as it goes, but it contains an invidious implication that the rule applied below was a peculiar piece of local legislation. While a strong argument might be made that a state may enact any peculiar legislation that it chooses, as long as it does not clearly conflict with "the supreme Law of the Land," U. S. Const., Art. VI, Respondent need not make that argument here.

The law which Kentucky seeks to enforce is neither local nor peculiar. While it is expressed in her statutes, pursuant to a mandate in her Constitution, it is basically a rule of her common law which does not differ from the common law applied in other jurisdictions of the United States. Of it the Court of Appeals of Kentucky said (99):

"The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: 'Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.' Subsection 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall 'subject any person to any unreasonable discrimination.' KRS 281.990(1) stipulates that any person who 'violates, or causes, aids or abets any violation of, any of the provisions of this chapter,' which includes KRS 281.685(1) and (2), 'shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both.'

"See also 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-72."

The Kentucky court was applying one part of a consistent body of rules designed to insure that common carriers and their employees, as long as they hold themselves out to be such, perform the services required of them. This requirement of service comes most sharply to the fore when there are labor disputes. Even here the carriers and their employees have not

been exonerated from performing their duties. This is made clear by three types of cases.

1. Cases where employers engaged in a labor dispute have obtained injunctions to compel carriers or their employees, or both, to perform their duties: *Pacific Gamble Robinson Co.* v. *Minn. & St. L. Ry.*, 83 F. Supp. 860 (D. Minn., 1949), appeal dismissed, 181 F. 2d 812 (8th Cir., 1950); *Burgess Bros. Co.* v. *Stewart*, 112 Misc. 347, 184 N. Y. Supp. 199 (Sup. Ct.), aff'd on other grounds, 194 App. Div. 913, 185 N. Y. Supp. 85 (2d Dep't, 1920); *Burgess Bros. Co.* v. *Stewart*, 114 Misc. 673, 187 N. Y. Supp. 873 (Sup. Ct., 1921); *Best Motor Lines* v. *International Brotherhood*, 150 Tex. 95, 237 S. W. 2d 589 (1951); *Truck Drivers* v. *Whitfield Transp., Inc.*, 259 S. W. 2d 947 (Tex. Civ. App., 1953); *Turner* v. *Zanes*, 206 S. W. 2d 144 (Tex. Civ. App., 1947); *Cf. Buyer* v. *Guillan*, 271 Fed. 65 (2d Cir., 1921).

2. Cases where carriers who have failed to perform their duties to a customer involved in a labor dispute have been held liable in damages or subject to administrative penalties: *Pacific Gamble Robinson Co.* v. *Minn. & St. L. Ry.*, 105 F. Supp. 794 (D. Minn., 1952), aff'd as modified, 215 F. 2d 126 (8th Cir., 1954); *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 23 CCH Lab. Cases, ¶67,713, 32 L. R. R. M. 2386 (D. Ore., 1953); *Consolidated Freight Lines, Inc.* v. *Dept. of Public Service*, 200 Wash. 659, 94 P. 2d 484 (1939).

3. Cases where carriers have been held entitled to injunctive relief against their employees to compel

them to perform their duties as long as they continued working for the carrier, or against strikers to compel them not to interfere with the employees' performance of their duties: *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 Fed. 730 (C. C. N. D. Ohio, 1893); *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio), appeal dismissed *sub nom*; *In Re Lennon*, 150 U. S. 393 (1893); *Erie R.* v. *Local 1286, International Longshoremen's Ass'n*, 117 F. Supp. 157 (W. D. N. Y., 1953); *Northwestern Pac. R.* v. *Lumber & Sawmill Workers' Union*, 31 Cal. 2d 441, 189 P. 2d 277, 1948); *Terminal R. Ass'n of St. Louis* v. *International Ass'n of Machinists*, 333 Ill. App. 288, 77 N. E. 2d 448 (4th Dist., 1948); *Burlington Transp. Co.* v. *Hathaway*, 234 Iowa 135, 12 N. W. 2d 167 (1943); see *New York, N. H. & H. R. R.* v. *Jenkins*, 122 N. E. 2d 759 (Mass. 1954).

**C. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT AN UNFAIR LABOR PRACTICE UNDER THE PROVISO TO SECTION 8(b) OF THE LABOR MANAGEMENT RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE JURISDICTION OVER IT.**

Congress has defined unfair labor practices in Section 8 of the Labor Management Relations Act and has empowered the National Labor Relations Board in Section 10(a) to prevent any person from engaging in any unfair labor practice listed in Section 8 and affecting commerce. Section 8(a) is concerned with unfair labor practices committed by employers, and Section 8(b) with unfair labor practices committed "by a labor organization or its agents."

Inasmuch as the weight of the evidence is that the refusals to serve respondent were refusals of independent employees that were not sanctioned by a labor union or its agents, the National Labor Relations Board at the outset does not have jurisdiction. In addition to this, however, Section 8(b) contains the following proviso:

> "Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Under this proviso, refusal to cross a picket line under the circumstances stated in it is expressly excluded from the unfair labor practices which the National Labor Relations Board may prevent a union or its agents from committing.

The holding of the Court of Appeals of Kentucky in this case that respondent and its subsidiary "operate as a unit" and that their alliance "is so close that both may be considered as one operation" (97-98), makes this proviso apply. The Board therefore was not authorized to take action with respect to the refusal of the truck drivers to cross the picket line.

By this proviso nothing contained in subsection 8(b) "shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer * * *." These are not appropriate words to

guarantee a right. Had Congress intended a guarantee, its choice of words in Section 7—"Employees shall have the right * * *"—shows that it knew how to do so. The wording of the proviso indicates an entirely different intention. Does this proviso supersede any state law to the contrary which does make such a refusal unlawful?

It does not advance the argument much to assert that Congress has the power in regulating commerce through the Labor Management Relations Act to supersede state law. The question still remains whether it has done so. As this Court said in *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485, 488 (1953):

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

As a pure matter of statutory construction, it is improper to read Section 8 as referring to anything more than a definition of the rights to be effectuated by the National Labor Relations Board; it is incongruous to assert that, by a proviso attached to its definitions, Congress intended to abrogate the corpus of state law regulating common carriers.

The legislative history supports the view that Congress was concerned solely with matters to come before the National Labor Relations Board. S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947):

> "Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strikebreaking activities would not be deemed an unfair labor practice unless the strike is a 'wildcat' strike by a minority group."

The Report does not say that refusal to cross a picket line should be exempt from all control, whether federal or state; it merely states that refusal to cross a picket line would not be deemed an unfair labor practice and so would not come within the cognizance of the National Labor Relations Board.*

If the scope of the proviso to Section 8(b) were as broad as petitioners contend it is, then the three lines of cases stated on pages 19 and 20 above governing the duties of common carriers and their employees would be overruled; but it is erroneous to contend that Congress has swept away all these cases by means of a proviso to a statute governing the unfair labor practices of labor organizations.

In interpreting the Labor Management Relations Act this Court has not lightly attributed to Congress an intention to override State law. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations*

*For a fuller discussion of the legislative history of this proviso, see Tower, *The Puzzling Proviso*, 1 Labor L. J. 1019, 1021-2 (1950).

*Board,* 315 U. S. 740, 749 (1942), cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 252-3 (1949).

In the *Allen-Bradley* case this Court affirmed the right of a state to enjoin mass picketing accompanied by threats and violence. This Court recognized that "a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," and said, "We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard." 315 U. S. at 749.

**D. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT A CONCERTED ACTIVITY PROTECTED BY SECTION 7 OF THE LABOR MANAGEMENT RELATIONS ACT.**

Petitioners argue (P. Br. 18) that every act of employees and labor organizations designed to assist labor unions is either protected or proscribed by the Labor Management Relations Act and that Congress has drawn a line separating all such acts into two classes. If protected, they are beyond state control as the exercise of federally-guaranteed rights; if proscribed, they are beyond state control because the Labor Management Relations Act provides an exclusive remedy.

As applied to this case, the argument is that the refusal to cross a picket line is not an unfair labor practice, because of the proviso of Section 8(b); it is therefore a concerted activity protected by Section 7.

The jurisdiction of the National Labor Relations Board, so it is argued, which fails because of the proviso to Section 8(b) is reinstated by Section 7.

In short, the argument is that Section 7 automatically draws around all concerted activities in labor matters a charmed circle which the states have no power to cross.

This argument has no support in the decisions. The Labor Management Relations Act guarantees some rights, provided that certain conditions are met. It proscribes some acts under certain other conditions. There remains an area in which concerted activities remain open to regulation under laws whose sources are other than the Labor Management Relations Act. Especially is this so where concerted activity can work great harm but, if not subject to state regulation, is subject to no regulation at all.

*International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949), holds that concerted activities in labor disputes are not necessarily removed from the scope of state law directed against illegal activities. There the union had adopted the tactics of causing sudden, unexpected, and irregular work stoppages, which were illegal under Wisconsin law. This Court held that Section 7, which protects concerted activities, did not supersede Wisconsin law. The court held, 336 U. S. at 257, that its previous decisions

> "* * * clearly interdict any rule by the Board that every type of concerted activity is beyond the

reach of the states' adjudicatory machinery. The bare language of § 7 cannot be construed to immunize the conduct forbidden by the judgment below and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with § 7 of the Federal Act."

Further examples of situations where concerted activities were not held to be protected by Section 7 of the Labor Management Relations Act are the following:

In *National Labor Relations Board* v. *Rockaway News Co.*, 345 U. S. 71 (1953), an employee's refusal to cross a picket line to make deliveries was held unprotected, justifying the employer's discharging him. In *Southern Steamship Co.* v. *National Labor Relation Board*, 316 U. S. 31 (1942), the disobedience of crewmen on shipboard in connection with a labor dispute was held cause to discharge them. In *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), violence which accompanied picketing was held unprotected by the National Labor Relations Act and subject to state regulation. For a general discussion of the question, see Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319 (1951), especially at 334-44.

This construction of Section 7 was recently reaffirmed in *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464 (1953), where this court held that a television station had not committed an unfair labor practice by discharging certain of its em-

ployees who had circulated a handbill disparaging their employer's programs. The court said (346 U. S. at 473):

> "Congress while safeguarding, in §7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying contractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:
>
> '[T]he courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. . . .'" [H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-9 (1947)]

**E. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT A STRIKE PROTECTED BY SECTION 13 OF THE LABOR MANAGEMENT RELATIONS ACT.**

Section 13 of the Labor Management Relations Act provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The right to strike is protected under this section of the Labor Management Relations Act, and the states may not interfere with it. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of*

*America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951).

On the other hand, work stoppages of a kind other than strikes are not protected. In *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949), this Court held that the type of irregular work stoppage which the union's members had practiced was not protected under Section 13 of the Labor Management Relations Act. The union promoted these irregular work stoppages as "a better weapon than a strike" because they avoided hardship on employees, but "put strong economic pressure on the employer." 336 U. S. at 249-50. The Wisconsin Employment Relations Board enjoined the employees from "concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike." 336 U. S. at 250.

Both the activities and the injunctive relief there in question are very similar to those in this case. The state forbade the intermittent stoppages, but preserved the right to stop work entirely. This Court upheld the state. It said (336 U. S. at 264-5):

> "If we were to read §13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slow-down and perhaps the sit-down strike as well. * * *

"We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. * * *

"We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device."

In *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486 (8th Cir. 1946), certain employees at Ward's Kansas City store refused to process orders from its Chicago store (where a strike was in progress), but continued otherwise to do their work. The Eighth Circuit held (157 F. 2d at 496-7):

"While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.

* * * * * * *

"The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act. They were not on a strike; they did not leave the premises nor the employment. There being an implied obligation on the part of the employees to obey the reasonable instructions of the employer while the employment continued, their refusal to do so

was proper ground for their discharge, and having been properly discharged there was no duty on the part of respondent to reinstate them."

In *C. G. Conn* v. *National Labor Relations Board*, 108 F. 2d 390 (7th Cir. 1939), certain employees remained at work during their regular shift, but refused to work overtime and were discharged. The Board held that this concerted activity "amounted to a strike," but the court held it was not, saying (108 F. 2d at 397:

"We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.

* * * * * * *

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. * * *"

In *Hoover Company* v. *National Labor Relations Board,* 191 F. 2d 380, 389 (6th Cir. 1951), the Court said:

> "* * * An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business. * * *"

These cases were cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 257 (1949), and *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers,* 346 U. S. 464, 476 n. 12 (1953).

The injunction below scrupulously refrained from interfering with the right of the carriers' employees to go out on an actual strike of the kind which is protected under Section 13 of the Act.

The refusal of the employees of common carriers to enter upon respondent's—and only respondent's—premises was an irregular and selective work stoppage, not a strike which is protected by Section 13 of the Labor Management Relations Act. It was not an unfair labor practice of which the National Labor Relations Board could take jurisdiction under Sections 8(b) and 10(a) of the Act. It was proper for Kentucky to forbid it.

It was therefore also proper for Kentucky to forbid the inducement of employees of common carriers to commit the acts of discrimination which were directly forbidden. The act being illegal, inducement of another to commit the act may properly be restrained. *Building Service Union* v. *Gazzam*, 339 U. S. 532 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

## POINT II.

### The Decision Below Properly Refused to Enforce the Agreement Permitting Employees of Common Carriers to Refuse to Pick Up or Deliver Shipments.

Petitioners argue that the agreement between the carriers and their employees exempting the employees from the duty of picking up or delivering goods at struck premises or handling unfair goods relieves them from the duty of serving respondent without discrimination. This argument has two aspects: (1) That the agreement limits the scope of the employment of carriers' employees, so that it is no part of their duties to pick up and deliver goods at struck premises; and (2) that the agreement is protected under the Labor Management Relations Act and can supersede contrary state law.

1. As to the argument (P. Br. 36-7) that the agreement defines the duties of employees of common carriers to exclude picking up and delivering goods at struck premises, it is clear that agreements cannot limit the scope of employment in a way calculated to thwart public policy or the law of the land. This Court, in *Steele* v. *Louisville & Nashville Railroad*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944; and *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949), saw through attempts to use job classifications and assignments established by collective bargaining agreements as means to practice racial discrimination; it enjoined the enforcement of

the agreements. See, also, *Montgomery Ward & Co.* v. *Terminal Co.*, 32 L. R. R. M. 2386, 23 CCH Lab. Cas. Par. 67,713 (D. Ore., 1953).

2. Petitioners and the National Labor Relations Board cite *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U. S. 71 (1953), for the proposition that an agreement excusing the employees of a common carrier from their duty of service because of a strike is protected by federal law. They rely only upon an isolated sentence in the opinion, 345 U. S. at 80, and do not take any account of the facts of the case. In that case, the Rockaway News Supply Co. was in the business of picking up newspapers from their publishers and delivering them to retailers. It was not a common carrier. A newspaper became involved in a labor dispute with its own employees, who picketed its plant. Waugh, an employee of Rockaway News Supply Co., seeing the picket line, refused to cross it to pick up newspapers and was discharged.

The collective bargaining agreement of Waugh's union with his employer contained a provision that the employees would not engage in strikes or "other cessation of work."

This Court held that the no-strike provision was not prohibited by the Labor Management Relations Act, and that Waugh was properly discharged for violating it. The Court then made the remark that the proviso to Section 8(b) of the Labor Management Relations Act "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."

Conceding that a non-carrier employer, with no legal duty to serve any particular customer, may contract with his employees that their duties shall not include crossing a picket line, Respondent submits that the *Rockaway News Supply Co.* case cannot be extended to cover an employer who would thereby disable himself from performing a service which he has a legal duty to the customer—and to the public—to perform, nor to protect employees who seek thereby to obtain for themselves the privilege of violating at will the law which defines their duties.

In the language of Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357 (1908):

> "* * * One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

See, also, his language in *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374 (1924):

> "* * * The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."

This Court has recognized the power of the states to enforce their laws and public policy unhampered by contracts which purported to remove the subject matter from the states' regulatory power.

*Bowersock* v. *Smith,* 243 U. S. 29 (1917), dealt with a claim for wrongful death of an employee resulting

from the employer's failure to comply with the law requiring guards around dangerous machinery. The employer contended that he had made an agreement with the deceased employee, who thereby had undertaken to furnish the necessary guards, and this agreement relieved him of liability. The Court rejected this contention, 243 U. S. at 34-5:

> "It is clear that the statute * * * imposed a duty as to safeguards upon the owner which was absolute and as to which he could not relieve himself by contract. * * * in the nature of things the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered ineffacious."

Furthermore, since the agreement in question was not made with respondent, but with persons entirely unrelated to respondent, there is even more reason for holding it ineffective in the circumstances of this case. This Court said, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 619 (1909): "Whenever one engages in that business [common carrier] the obligation of equal service to all arises * * *." Since this is so, why should this obligation of equal service to all the public be subject to variation, not at the overriding behest of the Legislature, but at the desire of carriers and third persons with whom they contract? If the rights of the public are not to be cut down by contracts which carriers make with members of the public themselves, *e. g., Railroad Co.* v. *Lockwood*, 17

Wall. 357 (U. S. 1873), there is even less reason for them to be cut down by contracts which carriers make with third persons.

While Respondent need not argue any point not directly at issue before this Court, it suggests that a possible rationale of and accommodation between the proviso to Section 8(b) of the Labor Management Relations Act and the contract provision between employers and their employees would be: The proviso to Section 8(b) prevents the refusal to cross a picket line from being considered an unfair labor practice under the Labor Management Relations Act. The proviso does not affect the validity or invalidity of such a refusal under state law. Where the law governing carriers treats such a refusal by the employees of a common carrier as a discriminatory practice, the carriers and their employees may not by contract permit this discrimination.* In other situations, employers and their employees are free to provide by contract that the employees need not cross—or that they must cross—a picket line set up by the employees of someone with whom the employer does business.

This suggested construction allows room for federal law, state law, and the contracts of employers and employees; it accommodates the various interests by minimizing the conflicts among them.

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*Torbert, "Section 8 (b) (4) (A) of the Taft-Hartley Law: A Study in Statutory Interpretation," 8 Rutgers L. Rev. 344, 372 (1954), concludes from a study of the cases that contracts of the type involved here are not unlawful if "Common carriers and shippers are not involved."

## POINT III.

**The Federal Question of the Jurisdiction of the Interstate Commerce Commission Was Not Timely Raised in the Courts of Kentucky and Is Not Properly Before This Court.**

Although the fact that transportation in interstate commerce was involved was obvious from the beginning of the suit, the question of the jurisdiction of the Interstate Commerce Commission was not raised by the pleadings, or argued in the trial court, nor in any way mentioned in the record which went up to the Court of Appeals of Kentucky, nor was it presented in petitioners' brief.

Under the settled law of Kentucky, the Court of Appeals does not determine questions not raised in the trial court.

> "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this Court." *Combs, Judge* v. *Knott County Fiscal Court,* 283 Ky. 456, 458, 141 S. W. 2d 859, 860 (1940).

To the same effect are *Tipton* v. *Brown,* 273 Ky. 496, 117 S. W. 2d 217 (1938); *Dorman* v. *Hook,* 260 Ky. 367, 85 S. W. 2d 1001 (1935); and, in more detail with citation of substantial authority, *Benefit Ass'n of Ry. Employees* v. *Secrest,* 239 Ky. 400, 411, 39 S. W. 2d 682, 686-7 (1931); *Cf. Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945); *Mutual Life Ins. Co. v. McGrew,* 188 U. S. 291, 309 (1903).

After the Court of Appeals of Kentucky had affirmed the judgment below, the federal question of the jurisdiction of the Interstate Commerce Commission was for the first time raised in a petition for rehearing to the Court of Appeals of Kentucky.

"It is an established rule that briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review; and ordinarily they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to the Supreme Court." Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §79 (Wolfson and Kurland eds. 1951). As this Court said in *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57, 59 (1884):

> "We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests."

The original opinion of the Court of Appeals of Kentucky did not refer in any way to the question of interstate commerce. That Court's treatment of the petition for rehearing appears in its order of February 5, 1954 (95):

> "The Court being sufficiently advised, the petition of appellants for a rehearing be and the same is hereby overruled, and opinion modified on its face."

None of the modifications of the Court's original opinion referred to in this order have anything to do with the question of the jurisdiction of the Interstate Commerce Commission.* There is nothing in the record or in the opinion in its final form to indicate that the question whether the Interstate Commerce Commission had jurisdiction was considered or determined on its merits.

The situation is thus no different from that in *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117 (1923):

> "All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 682, 689; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106 * * *. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary."

A similar holding appears in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455 (1924):

> "This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually enter-

*The two opinions of the Kentucky Court of Appeals are printed in consolidated form, so as to show exactly what modifications were made, in the Appendix, pages 61-70. Since no change in the substance of the Opinion was made, this case may fairly be classified as one in which the petition for rehearing was denied "without opinion."

> tained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion, is not enough."

See also *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 163 (1932); *Live Oak Water Users' Association* v. *Railroad Commission of California,* 269 U. S. 354, 357 (1926); *Fullerton* v. *Texas,* 196 U. S. 192 (1905); *Simmerman* v. *Nebraska,* 116 U. S. 54 (1885); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §75 (Wolfson and Kurland eds. 1951); Stern and Gressman, Supreme Court Practice 88-9 (2d ed. 1954).

It being apparent that the federal question was not properly before the Court of Appeals of Kentucky and that that Court did not pass upon it, petitioners have attempted to import the federal question into this case by means of two certificates of a justice of that Court. The first certificate (103-4) was signed by Mr. Justice Brady M. Stewart as "Acting Chief Justice of Court of Appeals of Kentucky." This certificate is insufficient under the rule of *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 n. 1 (1945). In that case this Court refused to accept a memorandum opinion of the presiding justice of a State court of last resort to the effect that a federal question was raised and decided. Chief Justice Stone wrote:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally

> sufficient to sustain our jurisdiction, when it is consistent with the record * * *, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §81 (Wolfson and Kurland eds. 1951); Stern and Gressman, Supreme Court Practice 93-4 (2d ed. 1954); Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question,* 63 Harv. L. Rev. 111 (1949).

After September 20, 1954, when Mr. Justice Stewart became Chief Justice of the Court of Appeals of Kentucky, see 269 S. W. 2d v, and apparently after this Court granted the petition for certiorari, petitioners obtained a second certificate (105) from Mr. Justice Stewart as "Chief Justice, Court of Appeals of Kentucky." This certificate has all the infirmities of the first certificate. Neither certificate purports to "interpret indefinite or ambiguous evidence in the record"; each seeks to remedy a complete lack of evidence.

The case before the Court is thus even weaker than *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway,* 228 U. S. 326 (1913), where this Court rejected a certificate by the presiding justice of a state court of last resort which was more specific than the certificates of Mr. Justice Stewart in that it specifically set out the federal question. The Court said (228 U. S. at 334:

"Having neglected to raise any Federal question before the final judgment in the state Supreme Court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs in error have endeavored to show that in fact the Supreme Court of Virginia did rehear the case upon their petition and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the Chief Justice of the court, *months after the court had handed down its final opinion,* that the court, 'refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court . . . did not constitute a taking of the property of the defendants in error without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment.' This certificate was never made the order of the court and a part of the record, as in *Marvin* v. *Trout,* 199 U. S. 212, where it was held 'perhaps sufficient' to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled rule of this court. That in itself it cannot confer jurisdiction is too plain for controversy." (Emphasis added.)

Petitioners' only reply to the argument that the federal question of the jurisdiction of the Interstate Commerce Commission is not properly before this Court is a citation, in a footnote of their brief (p. 75 n. 24), to *Baltimore & Ohio Railroad* v. *United States*

*ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910). This Court was there reviewing the decision of a lower federal court, not a state court, so there was no necessity for seasonably raising a federal question at an appropriate time. The proper respect owed by litigants to state courts requires that those who would upset their decisions on federal grounds should carefully preserve and present the federal question. *Cf.* Revised Rules of the Supreme Court of the United States, Rule 23 (1)(f).

The federal question was raised too late below. It is too late to raise it here.

## POINT IV.

### The Injunction Does Not Infringe Upon the Jurisdiction of the Interstate Commerce Commission.

The Interstate Commerce Act is not intended to occupy the entire field of transportation law so as to deprive state courts of all jurisdiction of cases arising under the Act; on the contrary, it expressly preserves existing statutory and common-law rights and remedies.

Section 9, 49 U. S. C. §9,* provides that any person claiming to be damaged by any carrier may complain to the Commission *or* may bring suit in his own behalf, but must elect which remedy he will pursue.

Section 22, 49 U. S. C. §22, provides in part:

> "* * * nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies * * *"

Section 216(j) of the same Act, 49 U. S. C. §316(j), provides:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Although the literal language of Sections 9 and 22 of the Interstate Commerce Act might have been thought to make resort to the Interstate Commerce Commission optional, this Court, in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1904), held that

*Appendix, p. 71.

certain cases of discrimination must first be taken to the Interstate Commerce Commission and that courts might not at the outset hear them.

The *Abilene* case, however important as it is, has never been regarded as cutting off all resort to courts. Just a few years after it decided the *Abilene* case, this Court, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), upholding a judgment of the Supreme Court of Kansas which required the Railroad to serve the Mills without discrimination, disposed of the contention that jurisdiction of the Interstate Commerce Commission was exclusive, saying, at 619-620, 623:

> "The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.
>
> * * * * * * *
>
> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. * * * Run-

ning through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed."

The wrong which the injunction here sought to prevent was the arbitrary and unlawful refusal by drivers employed by common carriers to handle shipments to or from respondent's plant. This refusal was motivated solely by their desire to assist other members of the same union in their dispute with respondent's subsidiary. It was not based upon any difficulty or danger that would be encountered; there was none. It was not based upon any rule or practice of the employing carriers, for the carriers did everything in their power to persuade their employees to handle the goods, and never questioned their obligation, as carriers, to see that the shipments were moved. The carriers were not parties to the case, and the injunction is not directed at them. They were not doing anything which the Interstate Commerce Commission could forbid, nor refusing to do anything which the Commission could command. There was no administrative question between the carriers and respondent which called for exercise of the specially qualified jurisdiction of the Commission. As between the carriers and respondent there was no question at all.

That the state courts are authorized to grant relief in such situations was made clear in this Court's decision of *Pennsylvania Railroad* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915), a suit brought in a state court by a shipper to recover damages for the Railroad's discrimination in not furnishing as many cars as its own rules called for. In upholding the state court's judgment, this Court referred to the Interstate Commerce Act as follows, 237 U. S. at 130:

> "It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive."

Noting that the case had been treated as an offense against the common-law duty, the state statute, and the federal statute, this Court held that the shipper was entitled to recover for breach of the common-law duty, 237 U. S. at 133, and that the question of fact involved was properly determinable by the state court, 237 U. S. at 131-2:

> 'But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits,

though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts."

The only question in this case is a question of law uncomplicated by any matters of administrative discretion. The courts are the proper bodies to decide questions of law, and recourse need not be had to the Interstate Commerce Commission.

In *Louisville & Nashville R.* v. *F. W. Cook Brewing Co.*, 223 U. S. 70 (1912), a common carrier had refused to deliver beer in interstate commerce because a Kentucky law prohibited common carriers from transporting alcoholic beverages. This Court held that a shipper of beer need not resort to the Interstate Commerce Commission, but might properly seek an injunction requiring the railroad to carry its products. This Court held that the propriety of the Railroad's refusal to carry turned upon the validity of a state statute. It said (223 U. S. at 84):

> "There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.
>
> "The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and

> the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute."

In *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), the rights of the parties depended entirely upon a legal construction of a tariff. The construction did not turn upon matters of fact and there was no question of administrative discretion. This Court held that a state court, not the Interstate Commerce Commission, had jurisdiction to construe the tariff.

In *Pennsylvania R.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120 (1916), a shipper asserted in a state court that the carrier was not allotting it the number of coal cars sufficient for its needs. The carrier contended that it was applying a rule governing car allotments and that, if this rule were to be attacked, it should be attacked only before the Interstate Commerce Commission, which had primary jurisdiction to pass on an administrative question of this nature. This Court said (242 U. S. at 126):

> "We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

A car allotment rule in time of shortage might have to be passed upon by the Interstate Commerce Commission, but that was not the case when there was no shortage.

Similarly, the strike at respondent's premises did not disturb the availability of the trucks of common carriers. They would have been able to fill respondent's usual needs for trucks. There is no showing that increased service was unavailable or that it was even demanded.

In *Pennsylvania R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913), the question was as to the validity of a rebate. It was contended that this question was one for the rate-regulating discretion of the Interstate Commerce Commission. This Court held that rebates were forbidden by positive law and said (230 U. S. at 197):

> "It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

See, also, *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry.*, 83 F. Supp. 860 (D. Minn. 1949), appeal dismissed, 181 F. 2d 812 (8th Cir. 1950).

Petitioners have argued on various grounds that the Interstate Commerce Commission has jurisdiction and that respondent should have resorted to it.

Petitioners first argued that the common carriers did not hold themselves out to serve strike-bound customers whose premises were being picketed. Petitioners' primary authority for this contention is *Pick Up Delivery Restrictions in Official Territory,* 269 I. C. C. 191 (1947).

Petitioners place too heavy a burden upon this decision. There the Commission approved the following tariff provision:

> "Impracticable Operation
>
> "Nothing in this tariff shall require the carrier to perform pick up or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of:
>
> (a) The condition of roads, streets, driveways or alleys.
>
> (b) Inadequate loading or unloading facilities.
>
> (c) Any riot, strike, picketing or other labor disturbance."

This provision read as a whole does not sanction the blanket refusal of a carrier to serve a customer because of a strike. The rule is in terms of what is practicable. The duty of a common carrier has never been absolute, nor does the decision below make it absolute. When a customer complains that a common carrier has not performed its duties, the facts may exonerate the carrier on various grounds, for instance, that the roads were impassable or that a strike at a customer's premises was attended with such violence

as to render it impracticable for the carrier to make deliveries. But all these defense are questions of fact, and the mere existence of a strike will not by itself free a carrier from performing its duty. *Minneapolis & St. Louis Ry.* v. *Pacific Gamble Robinson Co.,* 215 F. 2d 126 (8th Cir. 1954).

Petitioners' next argument is based on a failure to comprehend the rationale of the cases which they cite for the proposition that primary jurisdiction is in the Interstate Commerce Commission (P. Br. 73-8). All the cases which they cite are plainly of a technical nature whose determination requires the competence in transportation matters which the Interstate Commerce Commission possesses. Even a reading of petitioners' abstract of these cases in their brief is persuasive that they were outside the range of competence of the courts and within the special province of the Interstate Commerce Commission. For instance, such questions as whether open-top coal cars rather than box cars should be delivered to wagon mines as well as to tipple mines, as in *Midland Valley R.* v. *Barkley,* 276 U. S. 482 (1928), or the allocation of cars during a car shortage, as in *Baltimore & Ohio R.* v. *United States ex rel. Pitcairn Coal Co.,* 215 U. S. 481 (1910), or whether a carrier should have carried by one route rather than another, as in *Northern Pacific R.* v. *Solum,* 247 U. S. 477 (1918), are indubitably matters for the Interstate Commerce Commission.

One of the cases which petitioners cite (P. Br. 76-7) points this up well. In *Mitchell Coal & Coke Co.* v. *Pennsylvania R.,* 230 U. S. 247 (1913), this Court

required that the Interstate Commerce Commission determine the legality of certain practices in the first instance because they involved a question of reasonableness. Another aspect of the case, however, was held to be properly before the court under the rule of *Pennsylvania R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913), since it involved the legality *vel non* of a rebate, a question of law which a court could properly determine.

Contrary to petitioners' assertion (P. Br. 67), uniformity in interpreting the Interstate Commerce Act does not have to be secured by giving primary jurisdiction to the Interstate Commerce Commission. A similar argument, which was made in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), did not move this Court. Justice Brandeis wrote (259 U. S. at 290-1):

> "If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

Petitioners also cite *New York Lumber Trade Association* v. *Lacey*, 245 App. Div. 262, 281 N. Y. Supp. 647 (2d Dep't), aff'd without opinion, 269 N. Y. 595, 199 N. E. 688 (1935), cert. denied, 298 U. S. 684 (1936). Far from being "A leading—perhaps the leading—

case in the state courts respecting the question of state versus federal jurisdiction in the field of interstate shipping," as petitioners assert (P. Br. 80), this case has been cited only three times, never outside New York, and only on other grounds. The Appellate Division of the Supreme Court of New York did not rest its decision on the primary jurisdiction of the Interstate Commerce Commission. Since commerce by water was involved, an entirely different act, the Shipping Act of 1916, applied, as well as decisions such as *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), which interpreted it. The Appellate Division also recognized that the case came under the admiralty jurisdiction of the United States and could not be decided in state courts.

Petitioners also attempt to distinguish *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), and *Pennsylvania R.* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915). The grounds of distinction are insubstantial. For instance, petitioners treat the *Larabee Flour Mills* case as involving "an isolated act of discrimination against one particular shipper, not a practice regularly engaged in as is the case in the instant litigation * * *" (P. Br. 83). Petitioners also assert that a finding of discrimination in that case "would not operate to disrupt an existing rule or practice regularly engaged in by the carrier * * *" (*ibid.*).

These grounds of distinction do not bear examination. The statement of the Larabee case, 211 U. S. at 615, shows that the Railroad undertook a complete

cessation of service to Larabee following a dispute as to a demurrage charge, just as the drivers here undertook to completely deprive respondent of transportation by truck because of their Union's dispute with respondent's subsidiary. Neither does the record here show any regular practice of discrimination against picketed customers generally. The record suggests that it was sporadic if anything. At any rate, the regularity or irregularity of the practice is no criterion.

Petitioners attempt to distinguish the *Puritan Coal Mining Co.* case on the ground that there the carrier had failed to comply with its own rule and that "no administrative expertise was required in the resolution of the issue" (P. Br. 84). This is only a part of the story. As shown above, the courts also have jurisdiction when the legality of a practice of carriers is challenged and the question of legality can be determined under rules of law alone.

Finally, petitioners argue "that the Interstate Commerce Commission has on various occasions taken jurisdiction to adjudicate the precise issue in this case, *i. e.*, the legality of a carrier's practice in respect to making pick ups and deliveries at strike-bound plants * * *" (P. Br. 85).

The decisions of the Interstate Commerce Commission which petitioners cite are not authoritative. In none of the cases were the employees of the carriers or their labor union parties, and the Interstate Commerce Commission could not have asserted jurisdiction over the employees or their bargaining agents. The

sole duty and authority of the Interstate Commerce Commission over the employees of common carriers is as to their "qualifications and maximum hours of service * * * and safety of operation and equipment." Interstate Commerce Act §204(a)(1), 49 U. S. C. §304(a)(1).

The refusal of the carriers' employees to handle respondent's shipments was not a matter which affected the safety of the operations of the carriers. Consequently, the Act vests no authority in the Commission under which it could have required the individual employees to perform their duties.

On the contrary, Section 222(b) of the Act, 49 U. S. C. §322(b), only authorizes the Commission to apply to the United States District Court for the enforcement of the provisions of the Act or of its rules and orders. And, while the District Court is generally authorized by this section to enforce obedience thereto by writ of injunction or by other process, it is prohibited by the Norris-Laguardia Act, 29 U. S. C. §104 (a), from requiring the delinquent drivers to perform their duties. *Lee Way Motor Freight, Inc.*, v. *Keystone Freight Lines, Inc.*, 126 F. 2d 931 (10th Cir.), cert. denied, 317 U. S. 645 (1942); *Southeastern Motor Lines, Inc.*, v. *Hoover Truck Co., Inc.*, 34 F. Supp. 390 (M. D. Tenn. (1940).

Because the Commission does not have jurisdiction over the employees of common carriers, the relief it has been able to give has been only indirect. Thus, in *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M. C. C. 719 (1942), the Interstate Commerce

Commission found certain carriers guilty of discrimination in refusing, because they were afraid their own employees would go out on strike, to make interchanges with other carriers who were involved in a labor dispute. The Commission said (31 M. C. C. at 729):

> "The defendants cannot escape their common-carrier obligations by asserting that the violations complained of are caused by their employees. The corporations are responsible under the law for the acts of employes performed in connection with common-carrier duties; such acts are not beyond the scope of the employment. * * *
>
> "The defendants are not required by part II of the act to establish through routes and joint rates. They have elected to do so. * * * Common carriers by motor vehicle are obligated to accept and transport all freight offered to them in accordance with the provisions of their tariffs. The refusal of the group-two carriers to accept and transport complainants' freight tendered to them by Rutherford and the group-one carriers was and is unlawful. If the group-two carriers desire to continue to serve the public as common carriers, they should serve all of the public, including complainants."

Although this decision runs counter to many of petitioners' contentions and is a more appropriate authority for respondents to cite, yet it is basically unsatisfactory because it leaves the employees of the discriminating carriers free to refuse to perform their duties, and to threaten to strike unless their employers discriminate. If the employees refuse to obey their employers' orders to interchange freight, perhaps

their employers could discipline them (*Matter of Missouri Pacific Railroad,* 15 CCH Labor Cases ¶64,849, 23 L. R. R. M. 2135 (E. D. Mo. 1948)), but this is at best circuitous.

Accordingly, it would have been impossible for Respondent to obtain, through proceedings before the Interstate Commerce Commission, the relief which it obtained in the courts below.

The Kentucky courts were competent to grant the relief against the employees of common carriers which Respondent sought, and Respondent properly obtained this relief there.

## CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be affirmed.

Respectfully submitted,

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## APPENDIX.

# COURT OF APPEALS OF KENTUCKY

June 2, 1953

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GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., - - *Appellants,*

*v.*

THE AMERICAN TOBACCO COMPANY, INC., - *Appellees.*

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*Appeal from Jefferson Circuit Court,*
*Chancery Branch, Second Division,*
*Honorable Stuart Lampe, Judge.*

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## OPINION OF THE COURT BY JUDGE STEWART, AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL.

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Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross

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NOTE:

The two opinions are printed in consolidated form, to show the changes made on denial of rehearing.

Language appearing in the first opinion but omitted in the second opinion is in boldface type.

Language substituted or added in the second opinion is in italics.

a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike, but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments *in Louisville*, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picket-

ing can and should be restricted to the disputants in such a manner as to relieve it from *the* damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land by the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers *display* **(carry)** advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th *Street* and Arcade *Avenue* **(Streets)**, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for

treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In *that case* **(this opinion)** in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence

have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685

read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685(1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

**(The foregoing doctrine is set forth at length.)** *See also* 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity

of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

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"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

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"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Work-

ers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp., 1952), makes the question under discussion one exclusively controlled by **(the above)** *this* enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), *of the Act,* which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee **(s)** whom such employer is required to recognize under this sub-chapter."

**(We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful.** The appeal (here) involves the refusal of employees of *common or contract* carriers who *are not on strike but who* happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, *the statutory law and the Constitution of Kentucky.* **(the constitutional law and the statutory law of Kentucky.)** (More

**than that),** *Aside from this, as we have shown,* the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 v. Graham, 344 U. S. 811, and the cases cited therein.* It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.*

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of *such* **(common)** carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. *Here* **(Where)** the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by *a* statute, *which implements a constitutional provision, and we hold that* such a contractual stipulation is void. **(Such is the case here.)**

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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## STATUTES CITED.

Interstate Commerce Act § 9, 24 Stat. 382, 49 U. S. C. § 9.

"§ *9. Remedies of persons damaged; election; witnesses.* Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Interstate Commerce Act, Part II; Motor Carriers § 204(1), 49 Stat. 546, 564; 52 Stat. 1237, 49 U. S. C. A. § 304(1), 322(b).

"§ *304. Powers and duties of commission—(a) Powers and duties generally.*

"It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"*Jurisdiction of district courts to restrain violations and enforce orders.*

"§ 322(b). If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

Norris LaGuardia Act, §4(a), 47 Stat. 70, 29 U. S. C. § 104(a).

"§ *104. Enumeration of specific acts not subject to restraining orders or injunctions.*

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any

labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

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